

Merais Sdn Bhd v Lai King Lung & Anor (both practicing as Advocate and Solicitor in the name and style of Messrs Chris Lai, Yap & Partners)

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HIGH COURT (SHAH ALAM) — WRIT NO 22NCVC-723-12 OF 2013
AKHTAR TAHIR J
22 JANUARY 2018

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Evidence — Witness — Competency — Whether witness incompetent — Whether evidence of witness tainted — Whether evidence of witness ought to be expunged — Evidence Act 1950 s 118

C

Legal Profession — Duties — Client — Breach of fiduciary duties — Whether defendants breached fiduciary duties in handling and retaining plaintiff's trust monies — Whether trust monies were utilised as authorised

D

Limitation — Trusts — Limitation of actions — Plaintiff claimed that defendants breached fiduciary duties in handling plaintiff's trust monies — Defendants counterclaimed for legal fees — Whether actions barred by limitation — Limitation Act 1953 s 6

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This was a claim filed by the plaintiff against the defendants for a declaration that the defendants had breached their fiduciary duties in handling the plaintiff's trust monies and unlawfully retained the monies. In the present case, the plaintiff relied on, inter alia, the evidence of its director and majority shareholder of the plaintiff, SP1. The plaintiff was a company and owner of a 22 storey commercial building known as Menara Merais whilst the defendants were advocates and solicitors practicing under the firm Messrs Chris Lai, Yap and Partners ('the firm'). Prior to the establishment of the firm, the plaintiff and the first defendant had entered into a consultancy agreement where the first defendant was appointed as legal consultant for the plaintiff in managing all the plaintiff's legal affairs and company debts for a period of two years between 1 October 2005–30 September 2007. In 2005, the plaintiff sold Menara Merais and engaged the first defendant as vendor's solicitor for a total sum of RM57m. From that amount a sum of RM39.48m was deposited by the plaintiff in the clients account of the firm ('trust monies'). From time to time the plaintiff had issued written instructions to the firm to release a certain amount of the trust monies to either the plaintiff or various third parties. These written instructions also indicated the plaintiff's consent for the defendants to deduct certain amounts towards payment of the firm's legal bills. The defendants averred that there was a written authorisation by the plaintiff of the

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- A withdrawal of RM7,824,812.50 and sum of RM6,659,039 made via oral instructions of the plaintiff but the plaintiff denied giving such written or oral authorisation ('the plaintiff's denial'). The plaintiff's case centered around a claim for the sum of RM14,936,742.39 which was the balance sum in the trust monies after all payments as instructed by the plaintiff had been made inclusive of the defendant's legal fees. The defendant disputed that there was any balance left after all authorised payments had been made and counterclaimed for the remaining legal fees amounting to RM14,626,174.90. The sole determinative issue was whether the proceeds of the sale of Menara Merais which were placed in the trust monies were utilised as authorised.
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Held, dismissing both the plaintiff's claim and the defendants' counterclaim:

- (1) The court only had the opportunity to decide on the competency when SP1 was being cross-examined as the examination-in-chief was by way of a witness statement. The court concluded that the answers in examination-in-chief of SP1 were not his own and in all likelihood he had been assisted in giving those answers. By applying s 118 of the Evidence Act 1950, the court decided that SP1 was an incompetent witness. As such the court decided to expunge the entire evidence of SP1 which from the observation of the court was tainted (see paras 11 & 14).
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- (2) In the face of the plaintiff's denial, it was incumbent on the defendants to prove that such instructions came from the plaintiff as alleged by them, wherein this fact could have been easily proven by calling the person who collected the money on behalf of the plaintiff to testify. No attempt was made by the defendants to call this person although he was identifiable. The omission of the defendants even raised an adverse inference against them (see para 23).
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- (3) The last instruction given by the plaintiff was on 25 July 2007 and the first attempt to recover the balance of trust monies was six years later when the letter of demand dated 7 November 2013 issued to the defendants and the plaintiff filed this suit on 17 December 2013. The plaintiff's claim was therefore time-barred (see para 26).
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- (4) The amount of legal fees had been agreed between the parties and not subject to assessment in this court in line with s 126(1) of the Legal Profession Act 1976 (see para 29).
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- (5) The defendant's counterclaim like the plaintiff's claim were time-barred as the defendants only filed a counterclaim to recover the fees on 11 March 2014 being seven years from the last instructions according to their own pleaded case relating to the trust monies (see para 30).

[Bahasa Malaysia summary]

Ini merupakan satu tuntutan yang difailkan oleh plaintif terhadap defendan-defendan untuk satu deklarasi bahawa defendan-defendan telah melanggar tanggungjawab fidusiari mereka dalam mengendalikan wang amanah plaintif dan secara salah mengekalkan wang tersebut. Dalam kes ini, plaintif bergantung kepada, antara lain, keterangan pengarahnya dan pemegang saham majoriti plaintif, SP1. Plaintif merupakan satu syarikat dan pemilik bangunan komersil 22 tingkat yang dikenali sebagai Menara Merais manakala defendan merupakan peguamcara dan peguambela yang beramal di bawah firma Tetuan Chris Lai, Yap and Partners ('firma tersebut'). Sebelum penubuhan firma tersebut, plaintif dan defendan pertama telah memasuki satu perjanjian runding yang mana defendan pertama dilantik sebagai peguam kepada plaintif dalam mengendalikan semua hal undang-undang plaintif dan hutang syarikat untuk tempoh dua tahun antara 1 Oktober 2005–30 September 2007. Pada tahun 2005, plaintif telah menjual Menara Merais dan melantik defendan pertama sebagai peguam penjual untuk sejumlah RM57 juta. Daripada jumlah tersebut, RM39.48 juta di depositkan oleh plaintif ke dalam akaun anak guam firma tersebut ('wang amanah'). Dari masa ke semasa, plaintif telah memberikan arahan bertulis kepada firma untuk mengeluarkan sejumlah daripada wang amanah tersebut kepada sama ada plaintif atau pihak ketiga. Arahan bertulis ini juga memberikan kebenaran plaintif untuk defendan menolak sejumlah wang tertentu untuk membayar yuran guaman firma tersebut. Defendan menyatakan bahawa wujud satu kebenaran bertulis oleh plaintif untuk pengeluaran RM7,824,812.50 dan sejumlah RM6,659,039 yang dibuat secara arahan lisan dari plaintif namun plaintif menafikan memberikan arahan bertulis atau lisan tersebut ('penafian plaintif'). Kes plaintif berlandaskan satu tuntutan sejumlah RM14,936,742.39 yang merupakan jumlah baki wang amanah selepas semua bayaran yang diarahkan oleh plaintif dibuat termasuklah yuran guaman defendan. Defendan menafikan wujud apa-apa baki selepas semua bayaran yang dibenarkan dibuat dan membuat tuntutan balas untuk jumlah yuran guaman tertunggak berjumlah RM14,626,174.90. Isu tunggal untuk ditentukan adalah sama ada hasil jualan Menara Merais yang diletakkan dalam wang amanah telah digunakan sepertimana dibenarkan.

Diputuskan, mengetepikan tuntutan plaintif dan tuntutan balas defendan:

- (1) Mahkamah hanya mempunyai peluang untuk memutuskan kebolehan apabila SP1 diperiksa balas memandangkan pemeriksaan utama dilakukan melalui pernyataan saksi. Mahkamah menyimpulkan bahawa jawapan dalam pemeriksaan utama SP1 bukan dari dirinya sendiri dan dalam semua kebarangkalian dia telah dibantu dalam memberikan jawapan tersebut. Dengan mengguna pakai s 118 Akta Keterangan 1950, mahkamah memutuskan bahawa SP1 bukan seorang saksi yang kompeten. Oleh itu, mahkamah membuat keputusan untuk

- A membatalkan keseluruhan keterangan SP1 yang mana berdasarkan pemerhatian mahkamah telah tercemar (lihat perenggan 11 & 14).
- (2) Dalam penafian plaintif, adalah menjadi kewajipan defendan untuk membuktikan bahawa arahan tersebut datang daripada plaintif
- B sepertimana dikatakan oleh mereka, yang mana fakta ini boleh dibuktikan secara mudah dengan memanggil individu yang mengutip wang bagi pihak plaintif untuk memberikan keterangan. Tiada cubaan dibuat oleh defendan untuk memanggil individu ini walaupun dia boleh dicamkan. Kegagalan defendan ini menimbulkan prasangka salah terhadap mereka (lihat perenggan 23).
- C (3) Arahan terakhir yang diberikan oleh plaintif adalah pada 25 Julai 2007 dan cubaan pertama untuk menuntut semula baki wang amanah adalah enam tahun kemudian daripada tarikh surat tuntutan bertarikh 7 November 2013 dikeluarkan kepada defendan dan plaintif memfailkan guaman ini pada 17 Disember 2013. Oleh itu tuntutan plaintif adalah terhalang had masa (lihat perenggan 26).
- D (4) Jumlah yuran guaman yang dipersetujui oleh pihak-pihak tidak tertakluk kepada taksiran mahkamah ini selaras dengan s 126(1) Akta Profesion Undang-Undang 1976 (lihat perenggan 29).
- E (5) Tuntutan balas defendan sepertimana tuntutan plaintif dihalang oleh had masa memandangkan defendan hanya memfailkan tuntutan balas untuk menuntut yuran guaman tersebut pada 11 Mac 2014 iaitu tujuh tahun daripada arahan terakhir menurut kes yang dihidang oleh mereka
- F berkaitan dengan wang amanah (lihat perenggan 30).]

Notes

For a case on limitation of actions, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) para 2753.

- G For cases on client, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1606–1609.

For cases on competency, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3425–3427.

H Cases referred to

Tong Soon Tiong & Ors v FA Securities Sdn Bhd [2016] 6 MLJ 165; [2013] 2 CLJ 448, FC (refd)

I Legislation referred to

Evidence Act 1950 ss 103, 114(g), 118

Legal Profession Act 1976 s 126(1)

Limitation Act 1953 s 6

Melissa Chan Shyuk Wern (Paul Ong & Assoc) for the plaintiff.

Ho Kok Yew (Khor Heng How and Tan Han Sam with him) (Owee & Ho) for the defendants. A

Akhtar Tahir J:

[1] The plaintiff's claim against the first and second defendants is for a declaration that the defendants had breached their fiduciary duties in handling the plaintiff's trust monies and unlawfully retained the sum of RM14,936,742.39 belonging to the plaintiff. B

FACTUAL MATRIX C

[2] The plaintiff is a company and owner of 22 storey commercial building known as Menara Merais. Meanwhile, the defendants are Advocates and Solicitors practicing under the firm Messrs Chris Lai, Yap and Partners ('the firm'). D

[3] Before the establishment of the firm the plaintiff and the first defendant had entered into a consultancy agreement dated 1 October 2005 wherein the first defendant was appointed as a legal consultant for the plaintiff in managing all the plaintiff's legal affairs and company debts for a period of two years starting from 1 October 2005–30 September 2007. E

[4] In 2005, the plaintiff sold off Menara Merais and had engaged the first defendant as vendor's solicitor in the sale and purchase agreement with Maybank Trustees Bhd (as trustee for AmFirst Property Trust) for a total sum of RM57m. From that amount a sum of RM39,480,000 was deposited by the plaintiff in the client's account of the firm ('trust monies'). F

[5] From time to time, the plaintiff had issued written instructions to the firm to release a certain amount from the trust monies to either the plaintiff itself or various third parties. These written instructions also indicated the plaintiff's consent for the defendants to deduct certain amounts towards payment of the firm's legal bills. G H

[6] The plaintiff's case centers around a claim for the sum of RM14,936,742.39 which is the balance sum remaining in the trust monies after all payments as instructed by the plaintiff had been made and this included the defendant's legal fees. I

[7] The defendants disputes that there was any balance left after all authorised payments had been made. On the contrary the trust monies were

A insufficient to pay the legal fees of the defendants amounting to RM14,626,174.90. This is the subject of the defendants counterclaim against the plaintiff.

THE ISSUE

B [8] The sole issue determinative of this case is whether the proceeds of the sale of Menara Merais which were placed in the trust monies were utilised as authorised.

C **DECISION OF THE COURT**

Incompetent witness

D [9] The plaintiff's case started by the calling of SP1, the director and majority shareholders of the plaintiff. SP1's evidence was given before another High Court judge who recused himself after hearing part of the evidence of SP1. The case was then transferred to this court for continuation.

E [10] SP1 continued with his testimony in this court. This court took note of the fact that SP1 was totally unfamiliar with the facts of this claim. This could be observed from the fact that after every question posed to SP2 during cross-examination SP1 gave a standard reply that he was in no position to answer the questions as he had no knowledge of the matter at hand as everything was handled by the accountant. SP1 also due to unfamiliarity of the matter at hand as well as physical weakness was unable to understand the questions posed to him.

G [11] The plaintiff's counsel confirmed that the accountant would be called as the next witness and similar questions would be posed to her. Observing the answer from this witness as well as his state of health both mental and physical, the court concluded that the testimony of this witness would be of no assistance to the court. At this juncture, the court by applying s 118 of the Evidence Act 1950 decided that SP1 was an incompetent witness and directed his entire evidence to be expunged.

H [12] Section 118 of the Evidence Act 1950 states as follows:

I All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation — A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

[13] In the decided case of *Tong Soon Tiong & Ors v FA Securities Sdn Bhd* [2016] 6 MLJ 165; [2013] 2 CLJ 448 it was stated that:

[19] Section 11 of the Evidence Act 1950 is a specific provision that deals with issues of witnesses and highly relevant in shedding some light on the matter at hand. It reads:

All persons shall be competent to testify unless the court considers that they are prevented from understanding the question put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

[20] The above provision refers to categories of witnesses who may be disqualified from giving evidence by reason of tender age, extreme old age, incapacitated by diseases whether of body or mind, or any other cause of the same kind. The sole test of competence under this section is his intellectual capacity ie, his understanding (*Evidence Practice and Procedure* by Augustine Paul (3rd Ed) p 915; *Sidek bin Ludan v Public Prosecutor* [1995] 3 MLJ 178; [1995] 1 LNS 219). Under the illustration of Explanation a mentally disordered person or lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving direct rational answers to them. Even a dumb witness is a competent witness if he can give evidence in an intelligent manner eg, by writing or by signs (*Chai Kor v Public Prosecutor* [1965] 2 MLJ 208; [1965] 1 LNS 16). But eventually the court must ascertain their competency (*Kee Lik Tian v Public Prosecutor* [1984] 1 MLJ 306; [1984] 1 LNS 55).

[14] In this case, it must be noted that the court had the opportunity to decide on the competency only when SP1 was being cross-examined. The examination-in-chief of SP1 was by way of witness statement. Observing the answers given by this witness during cross-examination the court concluded that the answers in examination-in-chief of SP1 were not his own answers and in all likelihood he had been assisted in giving those answers. As such the court decided to expunge the entire evidence of SP1 so that neither side could benefit from the testimony of SP1 which from the observation of the court was tainted. This case cannot be likened to the situation where there is partial evidence given by the witness and the examination could not be completed for certain reasons. Under such circumstances the courts have ruled that the court should still assess the uncompleted evidence and not expunge totally.

The application of the trust monies deposited with the firm

[15] In this case there is no dispute as to the fact that the sum of RM39,480,000 was placed with the firm's bank account. There was however a slight difference on how the plaintiff and the defendants tabulated the said deposit being deposited to the firm's account.

- A [16] The plaintiff's record of the deposit of RM39,480,000 to the firm's client account is as follows:

Date	Item	Quantum (RM)
November 2005	Earnest deposit	5,700,000
4 July 2006	Balance of purchase price	33,780,000
Total		39,480,000

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- [17] Whereas for the defendants, the deposit transferred to the trust monies is as follows:

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Date	Item	Quantum (RM)
November/December 2005	1% of earnest deposit	570,000
December 2005/January 2006	9% balance of deposit	5,130,000
4 July 2006	Balance of purchase price (The purchaser paid directly to the plaintiff)	33,780,000
Total		39,480,000

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- [18] A vital dispute in this case was whether the firm's account only contained the deposits from the sale of Menara Merais or also all other monies as a result of other transactions of the plaintiff which were also handled by the defendants. The plaintiff contended that the firm's account also contained monies from other transactions of the plaintiff whereas the defendants maintained that the firms account contained only the deposit from the sale of Menara Merais.

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- [19] In determining this issue the court noted that both sides had agreed that until the 4 July 2006 the money from the sale of Menara Merais kept in the firm's account amounted to only RM5.7m. Yet the parties especially the defendants also agreed that before 4 July 2006 there were instructions for authorised withdrawal of RM9,693,513.26. On top of this amount the defendant's contended that there was a further authorisation of payment to the amount of RM2.45m although this was disputed by the plaintiff.

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- [20] Taking whatever sum into account the fact remains that the sum of authorised still exceeded the RM5.7m. The defendants therefore could only have honored the plaintiff's instruction if this amount of money was available in the account. As the defendants have not denied honoring the authorisation of the plaintiff the only inference that can be drawn is that the firm's account also contained money from the plaintiff's other transactions. Taking this into consideration this fact the court made a finding of fact that the firm's account for the plaintiff contained monies from other transactions handled by the

defendants and at the same time viewed the first defendant's evidence who testified representing the defendants with caution as he was not being truthful.

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[21] In this case there was also no dispute that a sum of money withdrawn from the trust money was on the authorisation of the plaintiff although there was a slight difference as to the amount. The plaintiff contended that it had authorised the withdrawal of RM24,543,257.61 whereas the defendants contended that the plaintiff had authorised the withdrawal of RM24,368,257.61.

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[22] The main dispute in this case was a further purported written authorisation by the plaintiff of the withdrawal of RM7,824,812.50 and sum of RM6,659,039 made via oral instructions of the plaintiff. The plaintiff denied giving such written or oral authorisation.

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[23] In the face of the plaintiff's denial it is incumbent on the defendants to prove that such instructions came from the plaintiff as alleged by them. Section 103 of the Evidence Act 1950 states as follows:

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The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

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The defendants could have easily proven this fact by calling the person who collected the money on behalf of the plaintiff to testify. No attempt was called by the defendants to call this person although he was identifiable. This omission of the defendants even raises an adverse inference against them.

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Section 114(g) of the Evidence Act 1950 states as follows:

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The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

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(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[24] Further in this case I believed the testimony of the plaintiff that in trusting the defendants especially the first defendant the plaintiff had made available the letterhead of the plaintiff to the defendants. The defendants from the court's view could have misused these letterheads to issue the instructions of withdrawal. The court also in the absence from the evidence to the contrary

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A believed the testimony that it was against the practice of the plaintiff to issue oral instructions for withdrawal of monies from the firm's account.

B [25] As a final determination taking into account the above factors the plaintiff is entitled to the balance remaining in the defendant's firm's account after deducting the authorised withdrawal, however bearing one important disclaimer that the claim of the money should have been made within the stipulated period as stated in s 6 of the Limitation Act 1953:

C (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —

- D (a) actions founded on a contract or on tort;
(b) actions to enforce a recognisance;
(c) actions to enforce an award;
(d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

E (2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

F [26] Herein, the last instruction given by the plaintiff as mentioned in their own pleaded case was on 25 July 2007 and the plaintiff first attempt to recover the balance of trust monies was six years later when the letter of demand date 7 November 2013 issued to the defendants and filed this suit on 17 December 2013. The plaintiff's claim was therefore time-barred and the court so ruled.

G [27] On the issue of the outstanding legal fees I accepted the plaintiff's contention whatever legal fees due to the defendants was incorporated in the authorised written instruction and it was upon the defendants to pay themselves of as authorised. If they had failed to do so it is to their own detriment.

H [28] The defendants tried to lead evidence that there was an admission on the part of the plaintiff of the defendants' outstanding legal fees. However on closer scrutiny of the evidence it was clear that the demand of fees made by the defendants and admitted to by the plaintiff was for matters unrelated to the sale of Menara Merais.

I [29] On an ancillary issue with regards the legal fees the court decided that the amount of legal fees had been agreed between the parties and not subject to assessment in this court in line with the s 126(1) of the Legal Profession Act 1976 which states as follows:

(1) An order for the taxation of a bill of costs delivered by any advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the advocate and solicitor, at any time within six months from the delivery of the bill, or, by the advocate and solicitor after the expiration of one calendar month, and within a year from, the delivery.

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[30] Apart from not being entitled to any legal fees for the sale of Menara Merais the defendant's counterclaim like the plaintiff's claim was time-barred as the defendants only filed a counterclaim to recover the fees on 11 March 2014 ie seven years from the last instructions according to their own pleaded case relating to the trust monies.

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FINAL DECISION

[31] Due to reasons of time limitations and for other reasons stated above both the plaintiff's claim and the defendants' counterclaim are dismissed and parties are ordered to bear their own cost.

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Both plaintiff's claim and defendants' counterclaim dismissed.

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Reported by Izzat Fauzan

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